In the Supreme Court of the United States.

OCTOBER TERM, 1878.

HARVEY et al.
vs.
THE UNITED STATES.
No. 706.

BRIEF FOR APPELLANTS.

This is an appeal from the Court of Claims.

STATEMENT OF THE CASE.

In the month of May, 1869, General T. J. Rodman, Lieutenant-Colonel of Ordnance, and Brevet Brigadier General, commanding the United States Arsenal at Rock Island, Illinois, published an advertisement (12) by which he invited proposals for the construction of the piers and abutments for a bridge over the river, between Davenport and Rock Island.

This advertisement contained the statement that it was proposed to build five common piers, one draw-pier, and two abutments, and that the total amount of masonry was estimated at ten thousand cubic yards. It also directed the parties making bids to "state the price per cubic yard of solid masonry at which they were willing to complete the work;" and that they should also state "separately the price per cubic yard of solid masonry" at which they were willing to undertake to build the piers and abutments, the United States furnishing stone, cement, and sand; and also "the price at which they (would) will agree to put in the necessary coffer-dams with their protections." Bidders were informed also that by personal application detailed information could be obtained with regard to the general form and dimensions of the piers and abutments, together with a profile of the bed of the river.

The claimants obtained detailed information in regard to the proposed work from the agents of the Government (106), and then, on

the 25th day of May, 1869, they submitted a proposal in the words and figures following, to wit (23):

"We propose to build the masonry of piers and abutments of the Rock Island bridge as per annexed advertisement:

"Small piers and abutments per yard.....$11 00
"Draw-piers per yard..... 13 00."

There was only one proposal for the work in addition to that of the plaintiffs, and that was at the rate of $12.70 per cubic yard of solid masonry (22), and $19.10 for the masonry, including six coffer-dams. The proposition of the claimants was accepted.

A formal contract was prepared by one of the clerks of General Rodman, upon a printed form (58), and the paper was signed by the parties. It contained a stipulation binding the contractors "to construct the piers and abutments for the new rail and wagon bridge to be built to connect the island of Rock Island with the city of Davenport, in accordance with such plans and specifications as may be fixed by proper authority acting for the United States." Nothing was said in this formal contract about "necessary coffer-dams with their protections." (See. contract, p. 7.) It is contended that this contract did not carry out the intention of the parties. It imposed upon the claimants the double work of putting in the coffer-dams and the other necessary preliminary work, which was not contemplated by them, and could not have been intended by the representative of the Government.

The work of putting in coffer-dams and other work preliminary to beginning to lay the masonry in the river was fully as expensive, and involved more risk, than all the masonry work (90, 91, 183, 202).

The contract also imposed upon the plaintiffs the obligation of constructing the piers and abutments according to any plans whatsoever, which might be devised or prescribed through the caprice or varying opinions of successive officers, without reference to the designs exhibited to the plaintiffs when they made their estimates and framed their proposal. (See 8 Court of Claims R., 506).

This language was used in framing the contract through accident or mistake, and did not embody the intentions nor carry out the designs of the parties to it. It gave to the Government an unconscionable advantage. The effect of it was not discovered and admitted by the plaintiffs until after the judgment of this court, which gave construction to those clauses of the instrument.

It was not intended by the parties that the plaintiffs should be bound by the contract to do anything more than to "build the masonry." (See the advertisement (12), proposals (23), Rodman's original estimate (20), and depositions (pp. 90, 91, 150, 151).

The plaintiffs constructed eight coffer-dams complete and partially finished three others, equal in all to at least nine perfect dams (167,

183, 202, 259, 260). They also performed all the labor and furnished all the materials in and about the preparations necessary before the work of building the masonry could go on. The officers of the United States furnished none of the materials for this branch of the work, notwithstanding the contract required that all the stone, cement, and sand should be supplied to the contractors (70). The reasonable value of this work was $75,000 (20, 22, 23, 90, 91, 150, 151, 167, 183, 259, 260, 259, 210, 214). The average depth of water for the common piers was given to the plaintiffs at the time they made their estimates as six feet (106, 109), but after the bridge had been actually located and the loose deposits of sand and gravel had been removed, it was found that the average depth was eleven feet and four inches. This increased depth increased the cost at least one-third (210, 214). The advertisement inviting proposals from bidders stated that the intention was to put into the bridge five common piers, one draw-pier, and two abutments, containing altogether about ten thousand cubic yards of masonry.

Upon this understanding of the facts the plaintiffs made their bid, and the contract was signed and delivered. About the 22d of July, 1869, the work of constructing the bridge was transferred to the Engineer Bureau of the War Department (109), and General Rodman and his subordinates, who had made the contract, had no further connection with the improvement. On the day of the transfer the work was stopped by a peremptory order, and the officer in charge of the work set about making general changes in the location and plans of the bridge, and in the location and form of the piers and abutments (101, 226).

The depth of water for the common piers, as given by General Rodman, was six feet (109); at the location of these piers when they were constructed the average depth was actually eleven feet and four inches (31). This great increase in depth of water of course increased the expense and risk not only as to the coffer-dams but as to the work of putting in masonry (210, 214).

The average depth of water for the draw-pier, as finally located, was only a fraction over six feet (31), instead of eight feet, as given at the time the bid was made, and this draw-pier was placed nearly at the point where one of the small piers was originally designed to be (106), in order probably to diminish the number of yards of masonry as much as possible. The common piers, according to the original plan, were to be seventy-four feet and six inches long by fourteen feet wide at the base (173), and the draw-pier was to be four hundred and fifty-nine feet long by fifty-six feet wide at the base (106, 109). The officer of the Government reduced the width of the common piers accross the top nearly one-half, and the draw-pier from about forty-four feet on top to thirty-six, and then to decrease the width at the bottom in a greatly increased proportion changed the "batter" or inclination from one inch to a half an inch in each perpendicular foot (105, 106, 109, 225, 226). Two additional abutments were added to the original design (74, 75, 76, 228).

It appears that the engineer officer found it necessary, in order to keep the cost of the bridge within the limit put upon it by the act of Congress, to remodel the bridge (226).

By these alterations the work of putting in the masonry was entirely changed, and a contract entirely different from that contemplated by the plaintiffs was imposed upon them. Both their risk and expenses were greatly augmented, and the profits upon the work, as estimated, were largely diminished, if not entirely taken away. The principal hardship upon the plaintiffs worked by these departures was that the alteration in the form of the piers and abutments preserving all the cut-stone work, which was the expensive part of it, while it made the reduction in the rough, or least expensive, portion. (See Ex. H. 51, 42, 54, 114, 151, 168, 202, 208).

The amount claimed for this work, over and above the allowance already made and paid, is $33,600, and the proof fully establishes the justice of this part of the claim.

The officers in charge of the work fully appreciated this important departure from the plans, and its onerous operation upon the plaintiffs, and favored an allowance for it (42, 76).

On the 7th day of October, 1870, the agents of the Government, without justifiable cause (see 328), expelled the plaintiffs from the work and proceeded to finish it themselves (48, 49, 50, 51; see 8 C. of C., 508). At this time the plaintiffs had procured and brought together a large quantity of tools, vessels, and machinery of great value. By the abrupt termination of the work at this late season of the year, this property became a total, or nearly a total, loss to them. The amount claimed for this loss is $25,000, and the proofs seem to support the claim (44, 129, 141, 162, 3, 4, 5, 178, 9, 180).

A large quantity of rough stone work was required in the construction of the Iowa shore abutment. For some unexplained reason the agents of the Government performed this work themselves. Also, in the construction of the pivot or draw-pier it was essential that the upper and lower rests should be connected together at the base by a sort of cribwork resting on solid masonry and filled in with rough stone-work. The agents of the Government, with the same anxiety to oppress the plaintiffs which so plainly distinguishes them in all their acts about this contract, employed laborers and performed this work themselves. The plaintiffs could have made large profits on these two particular branches of the job had they been permitted to do the work. The evidence relating to these two items will be found on pages 85, 86, 97, 100, 217, 223, 224, 228, 229, 230, 242, 243.

On this state of facts the plaintiffs, on the 14th day of December, 1870, exhibited their petition in the Court of Claims demanding payment for the work done and the materials furnished, and also for damages incurred by them in consequence of unreasonable delays caused by the officers of the Government. That cause was brought on for hearing in that court on the evidence, and in June, 1873, a judgment was rendered in favor of the plaintiffs for the sum of $42,-

306.49. This sum was made up by the allowance of $20,068.00 for damages on account of delays, and the sum of $22,238.49 for the balance due for work done and materials furnished in building the masonry work (328,329 ; see also 8 Court of Claims R., 501). Two of the principal items of the plaintiffs' claim in that case were for the construction of the coffer-dams and for damages resulting from the unlawful reduction of the dimensions of the piers and abutments, by which the inexpensive work was largely reduced in quantity and the expensive work was preserved as originally contemplated. But the Court of Claims decided that the proposal and bid constituted no part of the contract, and that the language of the final contract bound the plaintiffs to perform all the preliminary work necessary, including the construction of the coffer-dams; the court also held that by the terms of the contract the United States had the right "to fix the working plans and specifications" or, in other words, that the agents of the Government possessed the power to alter the dimensions of the piers and abutments in such manner as they might deem advisable for the interests of the Government, and that the plaintiffs could not lawfully object. (See opinion of court, 8 C. C., 501.) In a concurring opinion, one of the judges of that court referred to the hardships of the case, and the evident want of conformity in the contract to the intention of the parties, and mentions the want of power and jurisdiction in that court to reform such contract and to administer justice between the parties (8 C. of C., 511). The judgment of the Court of Claims was duly paid according to law, to the claimants. Afterwards the plaintiffs applied to Congress for further relief, and an act for their relief was duly passed, and approved Aug. 14, 1876, in the words and figures following, to wit :

"AN ACT for the relief of James W. Harvey and James Livesey, of the firm of Harvey & Livesey, of Wisconsin.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the claim of James W. Harvey and James Livesey for alleged labor done and materials furnished under their contract with the United States for the building of the masonry work for the piers and abutments of the bridge across the Mississippi river from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby, referred to the Court of Claims, for hearing and adjudication ; and to that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States, as a court of equity jurisdiction, and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said Government may require." (19 Stat., 490).

On the 30th day of August, 1876, in pursuance of the provisions of this statute, the plaintiffs exhibited their second petition in the

Court of Claims, by which they claim, among other things, payment for the work and material put into the coffer-dams, and for the loss occasioned to them by the unreasonable reduction in the sizes of the piers and abutments, by which the quantity of inexpensive work was largely diminished, while all the expensive work was required to be done; for profits which they might have made if they had been permitted to carry out the contract according to its true intent, and for the interest on the money due them (331). To this petition a demurrer was interposed, which was sustained by the court (337; see 12 C. C., 240). An amendment to the petition was then filed (337), upon which issue was joined. Afterwards, upon the suggestion of the court, a second amendment was filed (34), upon which issue was also joined.

The testimony used in the original case was used in the second trial, by stipulation of counsel and an order of the court (343). The cause was then heard upon the pleadings and evidence, and the court rendered a decree dismissing the petition (363), and from this decree the plaintiffs appealed to this court (364). See opinion of the court (343), and the dissenting opinion (356).

Assignment of Errors.

First. The Court of Claims erred in limiting the claim of the plaintiffs to the items for labor and materials, and excluding all other claims.

Second. Said court erred in dismissing the petition of the claimants. It was the duty of the court, instead of refusing to do anything, "to proceed in the adjustment of the accounts between" the parties and to "render such judgment as justice and right" might repuire, as it was directed to do by the said act of Congress.

Argument and Authorities.

It will be observed by reference to the opinions of the Court of Claims in this cause, found in the record (343, 356), that the only subject-matter of consideration in the court was whether or not the final contract embodies correctly the intention of the parties, and whether the testimony was sufficient to authorize a court of equity to reform the contract on the technical ground of accident or mistake.

It is contended on behalf of the appellant, in the first place, that this view of the case taken by the court is entirely too narrow; and, in the second place, that if it be correct, the evidence of mistake and want of conformity in the contract to the intentions of the parties, is conclusive.

In the case of Hunt *vs.* Rousmanier (1. Peters 13), this court, in speaking of the subject now under consideration, says:

"There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The

first is, that when an instrument is drawn and executed which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." See also the case of Snyder *vs.* May, (7 Harris, 239); and Ins. Co. *vs.* Hearne (20 Wall., 494); Adams Equity 166, 169.

In this case, an advertisment was published inviting proposals to perform the work in question, and bidders were requested to bid in three different ways, and to state: (1) the price per cubic yard of solid masonry at which they were willing *to complete* the work; (2) the price per cubic yard of solid masonry at which they were willing *to build the piers and abutments*; and (3) the price at which they were willing *to put in the necessary coffer-dams*, with their protections (12, 323). The appellants, on the 28th day of May, 1869, made a proposal, in pursuance of this invitation (324), in the words and figures following:

"We propose to build the *masonry* of piers and abutments of the Rock Island bridge, as per annexed advertisement:

"Small piers and abutments per yard.....$11 00

"Draw-piers per yard..... 13 00"

This solicitation for proposals and the resulting proposal of the appellants constituted a preliminary agreement (Ins. Co. *vs.* Hearne, 20 Wall.,494; Garfield *vs* U. S., 93 U. S., 242), and the formal contract dated June 1, 1869 (7), was drawn and executed and "was intended to carry into execution" that preliminary agreement. The paper however was drafted by a clerk upon a printed form, (58), and but little if any regard seems to have been paid to the important terms of the preliminary agreement before mentioned; the contract was so drawn as to impose upon the plaintiffs the obligation of completing the whole work for the price at which they had offered to build only the *masonry*. This contract not only imposed this double obligation upon the contractors but it contained the unconscionable provision that they should do it "in accordance with such plans and specifications *as may be fixed* by proper authority, acting for the United States." The Court of Claims on the first trial, held that this provision of the contract authorized the Government agents to reduce the dimensions of the piers and abutments without reference to the rights of the contractors, and in such manner as they might decide upon, and that the contractors were bound to perform the work according to *any* plans which might be adopted, (8 C. C., 501). Now, when these proposals were invited, general plans giving the general form and dimensions of the bridge were exhibited to the bidders (105, 106, 107, 327), and to the appellants amongst the rest, and upon the basis of these plans and dimensions of the bridge thus given, they made up and submitted their proposition. To insert the provision in the contract requiring these men to build *any kind* of

piers and abutments which the officers might fix upon was clearly not carrying out the intention of the parties, nor was it a compliance with the terms of the preliminary agreement.

The fact that this contract was drawn upon a printed form is a very significant one. Printed forms of contracts are very generally provided to public officers by the departments and bureaux of the Government, and of course contain the same general provisions in all cases. It is not, therefore, to be wondered at, that this contract thus drawn, and by a clerk, too, who was probably entirely inexperienced in the art of drafting important legal instruments, should fail to conform to a special and somewhat complicated agreement and understanding.

The price at which these bidders offered to perform the work is so inadequate as to suggest the strongest probability that all the parties understood that the contractors were to build only the naked work of masonry, without undertaking to put in the coffer-dams. The testimony is conclusive that the expense of putting in coffer-dams was almost, if not entirely, as great as the expense of the masonry-work. The estimate for this masonry-work complete, made by Gen. Rodman was $24.00 (20). The offer of Saulpaugh & Co., to put in six coffer-dams of specified height, was at the rate of $10,616.66 each. But the height specified by their bid was not sufficient. Pier No. 5 stood in water $20\frac{5}{10}$ feet deep and the average depth of water was $11\frac{44}{100}$ feet (31). In April, 1870, the water arose to a height of $16\frac{15}{100}$ feet above low-water mark. (27). The appellants built eight coffer-dams complete, and partially completed three others (70), and ten dams in all were necessary: one for each of two abutments, one for each of the five piers and three for the pivot pier. At the rate proposed by Saulpaugh & Company, the expense of building the dams would exceed $106,000.00. (See the admirable argument of Mr. Justice Nott, on the question of inadequacy of price, R. p. 358.)

It has been asserted in behalf of the defendants, that the appellants, prior to September 13, 1869, the day on which they made their written demand that the Government should construct the coffer-dams, &c., (13), had made preparations to build the dams; and certain parts of the evidence are relied upon to show an intention on the part of the contractors to perform that part of the work. The deposition of Stickney, who was the officer in charge of the work, is relied upon. Stickney says (92), that the contractors had said, prior to September 13, 1869, that the Government should build the dams. He asserts (93), that they did make preparations for building the dams, but his specifications of what they did in this direction are not convincing. Warren's deposition is also relied upon (229), but his grounds for the assertion are open to the same criticism. The witness Davis swears (261), that he "got an impression" from certain conversations, that the contractors were to build the coffer-dams; and the witness Scott (247), relates a conversation with one of the contractors, which he says took place in 1870, in which Mr. Livesey admit-

ted that their original intention was to construct the dams. When we recall the solemn protest of September 15, 1869, this story seems extremely improbable. (See dissenting opinion, p. 359).

There are circumstances on the side of the appellants quite as significant as those relied upon by the defendants. By the terms of the contract (7), the United States agree to furnish "stone, cement, and sand." Now, stone and sand are as necessary in building cofferdams as in building a stone wall, yet the officers of the Government did not furnish either sand or stone for these dams (70); the contractors were actually charged with a few pieces of broken stone belonging to the Government, which they used in filling cribs. (See Ex. A., 258.) The advantage which the appellants have is, that their evidence on this point is record evidence. When the time arrived for the work to be done they immediately reduced to writing their demand upon the defendants to construct the dams; they were induced to proceed only upon the special promise of Gen. Warren that the subject-matter of dispute should be referred to the Attorney-General, (14). The advertisement and the proposals speak for themselves, and the argument from this inadequacy of the price for the whole work seems unanswerable. (See Story's Eq., § 246).

It is submitted to the court that, according to the most stringent rules governing the reformation of contracts, the plaintiffs are entitled to this relief. The facts in this case would command a reformation of a contract in a case between individuals. The law on this question will be found in the notes to Woollam *vs.* Hearn, vol. 2, pt. 1 L. C. in Eq., 944 (ed. of 1877). See also Collett *vs.* Morrison, 9 Hare, 162; Powell *vs.* Fireman's Ins. Co., 13 B. Monroe, 311; Cook *vs.* Nathan, 16 Barb., 342; Dill *vs.* Shohan, 25 Al., 694; Story's Eq., 136; Adams' Eq., 166; and the case of Herne *vs.* Ins. Co., 20 Wall., 496. In the latter case a contract of assurance was reformed for want of conformity to the preliminary agreement contained in letters which had passed between the parties; a case very much resembling the present. This court, in decreeing that the policy must be made to conform to the previously agreed terms, says: "The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company, in reply to his own, with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company."

The construction which the Court of Claims put upon this statute was a very strict and narrow one; and the great error which it committed had its origin in the preliminary judgment rendered upon the demurrer to the plaintiffs' petition. To be convinced that this decision was extraordinary it is only necessary to read the petition (331), and the dissenting opinion of Mr. Justice Loring (12 C. C., 146). The legislative department, when it passed this remedial

act, had before it the action of the Court of Claims and all the facts in the case. It was and, must have been, apparent that the petitioners were entitled to some relief in the premises. The legislators knew that the contractors, on the 15th day of September, 1869, presented to the agents of the United States a solemn protest against the assertion of those agents that the contract bound the plaintiffs to perform the labor and furnish the materials necessary for the construction of the coffer-dams, and that the same instrument compelled them to build the masonry of the piers and abutments according to any plan and device which might be prescribed by the caprice or changing notions of the successive officers coming upon the work, without regard to the original plans or the right of the contractors. They knew that the petitioners were lulled into security, and induced to proceed with the work, until it was too late to recede, by the unperformed promise of the agent of the Government that the decision of the highest law office of the Government should be invoked upon the question in dispute; and that no decision whatsoever was made until in the following November (356); and that then the decision was the result of the deliberations of the head of the department having charge of the work, and not of the law adviser of the Government (284). They knew that the contractors had made prompt and timely objections to the extraordinary action of the officers of the Government, in reducing the dimensions of the piers and abutments for the advantage of the Government, and to the disadvantage of the contractors—to economize for the Government at the expense of the contractors. That the claimants had been diligent and specific in insisting upon their legal rights when the officers of the Government undertook to defraud them by employing men to build the rip-rap walls on the Iowa shore and to construct the cheap masonry work connecting together the upper and lower rests of the pivot-pier, and that the Court of Claims had decided the controversy according to a strict legal construction of the language of this formal contract made and delivered to carry out the intention of the parties as expressed in the invitation for proposals and the offer of the appellants. All these facts being before them the legislature passed an act to meet the demands of justice and the equities of the case, and entitled it an act "for the relief" of the appellants. By this act the court was directed "to proceed in the adjustment of the *accounts* between said claimants and the United States as a court of equity;" and, if it should, in the discretion of that court, be necessary for the purpose of rendering "such judgment as justice and right" might require, "to reform said contract." By this act the whole "claim" of the petitioners arising under that contract was referred for adjudication, and not a part of it only. It was the plain duty of the court in obedience to this legislative direction to state an account between the parties involving all the transactions growing out of the contract, and in so doing, to proceed as a court of equity, stating accounts between man and man.

This statute is equivalent to an order passed by a court of equity directing a master to state an account between individual litigants. Such an account necessarily includes all the matters growing out of the contract which gave birth to the controversy. The seventy-ninth rule of the Supreme Court provides that in such cases the parties "shall bring in their accounts in the form of debtor and creditor." (See 79th Rule; 2 Daniel's Ch. Pr., 1218; Remsen *vs.* Remsen, 2 John. Ch., 495). To state an account, or, which is the same thing, to "adjust" the accounts between parties, according to this rule, necessarily implies a charge on the part of the plaintiffs against the United States as debtor, to be followed by all the credits to which the defendant is entitled, including a credit for the amount paid in consequence of the judgment. The facts attending the enactment of the statute can leave no doubt that the Congress was convinced that complete justice had not been done the claimants in the former adjudication. The design was to clothe the Court of Claims with the most ample powers to do complete and adequate justice in the matter, without regard to the previous adjudication. The Court of Claims, after conceding equitable rights to the plaintiffs, closes its opinion with this extraordinary language: "If, on review of all the facts in the case, the claimants have suffered injury for which they have received no compensation—a point upon which we express no opinion—Congress has reserved to itself the power of measuring the extent of the injury and of deciding whether it shall be compensated." When considered in reference to the directions of the statute to the Court to adjust the accounts between the parties as a court of equity, and to "render such judgment as *justice and right*" might require, this language is not easily understood. The act of Congress was not an idle form; it was intended to afford the plaintiffs a forum in which they could have their "claim" adjudicated according to its merits, as a matter of fair dealing between man and man, without the incumbrance of the inflexible rules of law applied in the previous judgment to the formal contract.

There is one part of the claim worthy of special notice in connection with the decision of the Court of Claims, by which it excluded from its consideration everything except those claims for specific labor and materials: The agents of the Government performed the work of constructing the wing-walls of the Iowa shore abutment, and also the connecting walls and crib-work between the upper and lower rests of the pivot-pier: this work was easily done and was profitable, and formed a part of the improvement as much as did any of the piers. The plaintiffs in their estimate for their proposal took this work into account in calculating their profits. According to the extent of the profits found in this, they diminished their charge for the cut stone and other expensive portions. To take this from them necessarily enhanced the cost of what was left. They are entitled to be made whole for this extraordinary action, whether it be by an allowance for depriving them of their profits, or by an increased

price for those portions of the work which they actually performed. Justice and right require that this unfair reduction in profitable work should be compensated by a corresponding increase in the price of the other work.

The attention of the court is invited to several documents found in the record, which are objected to as improper evidence; for instance, the letter of Theo. Edson (311); the opinion of Joseph Holt (281); the letter of T. J. Rodman (278), and other *ex-parte* papers in the record. The presence of such papers, without formal objections, is peculiar to the practice of the Court of Claims, and they are always treated as if covered by objections from the adverse party.

In conclusion, reference is made to the discriminating and able examination of the various authorities by Mr. Justice Nott, in the dissenting opinion of the Court. And it is submitted that the decree of the Court of Claims ought to be reversed, and that the cause should be remanded to that court with directions to proceed in the adjustment of the accounts between the parties, according to the provisions of the special act of Congress.

ENOCH TOTTEN,
Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JAMES W. HARVEY ET AL.
v.
THE UNITED STATES.
} In equity. No. 706.

APPEAL IN EQUITY FROM THE COURT OF CLAIMS, SUBMITTED UNDER RULE XX.

APPELLEES' ARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JAMES W. HARVEY ET AL.
v.
THE UNITED STATES. } In equity. No. 706.

APPEAL IN EQUITY FROM THE COURT OF CLAIMS. SUBMITTED UNDER RULE XX.

APPELLEES' ARGUMENT.

STATEMENT.

Not quite satisfied with the complainants' method of stating the case, I invite the careful attention of the court to the following statement of it:

This cause is the one numbered 11,406 in the Court of Claims, beginning on Record page 331; the preceding pages being evidence in this case (Record, 343) which was submitted to the Court of Claims, sitting in this single instance as a court of equity, under a special statute which, as it is the basis of the whole case, is printed in full at the outset of this argument.

The act of Congress referred to was approved August 14, 1876, and is as follows:

AN ACT for the relief of James W. Harvey and James Livesey, of the firm of Harvey and Livesey, of Wisconsin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of James W. Harvey and James Livesey *for alleged labor done and materials furnished under their contract* with the United States for the building of the masonry work for the piers and abutments of the bridge across the Mississippi River from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby, referred to the Court of Claims, for hearing and adjudication; and *to that end* jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States, as a court of equity jurisdiction, and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion reform said contract and render such judgment as justice and right between the claimants and the said government may require. (19 Stats., 490, bottom.)

As this special statute is the limitation of the equity jurisdiction of the Court of Clams, and consequently of the power of this court upon the present appeal, let us critically examine its terms. It refers to the court below one specific claim of the individuals mentioned, viz, the claim of Harvey & Livesey "for alleged *labor* done and *materials* furnished *under their contract*" of June 1, 1869—only that and nothing more—no other claim of theirs, any more than of any other person; and no claim of theirs, even for labor and materials, unless "furnished

under their contract" of the date specified. In adjusting the accounts for these particular items, the court was endowed with equitable jurisdiction; and if, by reason of fraud or mutual mistake, the written contract failed to express the true intent of the parties *as to these items* which went into or were required by the masonry work of that structure (the bridge across the Mississippi between Davenport and Rock Island), the court might, "if according to the rules and principles of equity jurisprudence" (and not otherwise), "in its judicial *discretion*, reform said contract and render such judgment [upon such reformed contract] as justice and right between the claimants and the said government may require," with reference to the labor and materials furnished and included within the terms of the contract so reformed.

Now let us see what were the facts as to the original contract, and as to labor and materials called for by it, and what were furnished under it; and then what is the evidence as to its being fairly made, or as to there being any mutual mistake in the draughting of it, whereby terms understood by both parties to be part of their agreement were accidentally omitted from the written contract.

In the month of May, 1869, General T. S. Rodman, lieutenant-colonel of ordnance, and brevet brigadier-general commanding the United States Arsenal at Rock Island, Ill., published an advertisement by which he invited proposals for the construction of the piers and abutments for a bridge over the river, between Davenport and Rock Island, as follows:

"PROPOSALS FOR BRIDGE MASONRY.

"Sealed proposals will be received at this arsenal up to 10 o'clock a. m. on the 25th day of May, 1869, *for the*

construction of the piers and abutments of the railroad and wagon-road bridge to be built to connect the island of Rock Island with the city of Davenport.

"It is proposed to build, *say*, five common piers, one draw pier, and two abutments; the stone and cement required for the work will be furnished on railroad cars on arsenal switch near the island and of the proposed bridge, and the sand required for the cement will be furnished by the United States at or near the same point.

"All masonry must be of the best quality of bridge masonry; the stones in each course must be well loaded and each course well secured by dowels to the course below, under cut-water, and at lower end of piers, and *the foundation course must be fairly bedded and well secured to the rock bed of the river.*

"The work, as it progresses, being subject to the inspection and approval of the commanding officer of the arsenal or such other officer or person as may be designated by proper authority.

"Detailed information with regard to the general form and dimensions of the piers and abutments, and a profile of bed of river, can be obtained by personal application at the arsenal.

"The total amount of masonry is *estimated* at *about* 10,000 cubic yards; all the piers and abutments will be required to be completed prior to the first day of December, 1869.

"*Parties making bids will state the price per cubic yard of solid masonry at which they are willing to complete the work*, the United States furnishing the stone, cement, and sand as above stipulated, *and nothing more.*

"*They will also make a bid stating, separately, the price*

per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing stone, cement, and sand as above, *and the price at which they will agree to put in the necessary coffer-dams*, with their protections.

"Proposals will be indorsed, 'Proposals for Bridge Masonry,' and addressed to the undersigned.

"The United States reserves the right to reject any bid not deemed satisfactory." (Record, 5, 6.)

In response to this advertisement, on the 25th day of May, 1869, the claimants submitted a proposal in the words and figures following, to wit:

"We propose to build the masonry of piers and abutments of the Rock Island bridge as per annexed advertisement:

Small piers and abutments, per yard.....$11 00
Draw-piers, per yard..... 13 00

"HARVEY & LIVESEY,
"*Madison, Wisconsin.*"

(Record, 6, bottom.)

This proposal was accepted, and on the 1st day of June, 1869, the following formal contract between the parties was executed, omitting the clauses as to interest of members of Congress, &c., and the formal conclusion:

"This contract, made and entered into this first day of June, one thousand eight hundred and sixty-nine, between Harvey & Livesey, of Madison, in the State of Wisconsin, of the first part, and the United States, by T. S. Rodman, l't colonel & bvt. brig. gen'l U. S. A., acting under direction and by authority of the Secretary of War, for and in this behalf, of the second part, witnesseth: That *the parties of the first part* do hereby *con-*

tract and engage with the said United States *to construct the piers and abutments for the new rail and wagon bridge* to be built to connect the island of Rock Island with the city of Davenport, *in accordance with such plans and specifications as may be fixed* by proper authority acting for the United States; the United States to furnish the stone, cement, sand, and all necessary templets required for the work, *and nothing more;* the stone and cement to be delivered on cars on the government switch, on the island, near the site of the work; all the masonry to be of first-class bridge masonry, in regular courses; the bond to be good; all the face stones to be laid alternately, as headers and stretchers, and the beds of all stones to be dressed, so that there shall be no mortar-bed of more than one-half ($\frac{1}{2}$) inch in thickness; the courses forming the cut-water of the piers to be smoothly dressed on their exposed faces and the remainder roughly dressed; and all courses to be securely fastened to each other, and the bottom course to the rock-bed of the river by such a system of dowelling as may be required by the proper authority in charge of the work; the character of the work to be daily inspected, as it progresses, by such officer or other person as the commanding officer of the Rock Island Arsenal, or other authority appointed by the United States, may designate; such inspector to have full authority to give any directions with regard to the character or manner of conducting the work; the whole work to be completed prior to the first day of December next, provided that the stone shall be delivered at the rate of 2,000 cubic yards per month. And in case of any failure on the part of the United States to deliver this amount of stone, then the work to be completed as soon after the first day of De-

cember as practicable. It is further stipulated that all cars bringing stone and cement shall be unloaded without unnecessary delay.

"All this work to be executed by the said parties of the first part, and all claims under this contract, if transferred to another party, are to be by such transfer forfeited—saving the rights of the United States. Payments, in such funds as the Treasury Department may provide, at the rate of thirteen (13) dollars per cubic yard for all masonry in the draw-pier, and at the rate of eleven (11) dollars per cubic yard for all other masonry; the masonry to be measured by taking the cubical contents of the finished work, excluding all technical and constructive measurements; payments to be made monthly, on the amount of work done during the month, when funds are on hand. * * *

"It is further stipulated and agreed that, if any default shall be made by the parties of the first part in the performance of their work specified in this contract, of the quality and at the times and places therein provided, that then, in that case, the United States shall have the right to take entire and exclusive charge of the work and to complete it in accordance with the conditions prescribed in this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completion of the work. * * * (Record, 7, 8.)

"And the said United States do hereby contract and engage with the said parties of the first part as follows:

"That for each of the articles herein contracted for which shall be delivered, inspected, and approved as aforesaid, there shall be paid in the funds aforesaid, to the said Harvey and Livesey, the covenantors, their heirs, executors,

or administrators, on bills in triplicate, made in approved form, and duly authenticated by the proper officers of the Ordnance Department, the sums heretofore specified, retaining ten per cent. on each partial payment until the completion of the contract." (Record, 7, 8.)

The claimants gave bond for the due performance of this contract and prepared to execute it. The supervision of the work having been transferred from the ordnance to the engineer department, some delay arose, and the location of the piers was changed from where it was at first thought they might be put, and their size was diminished; but it will be noticed that the contract did not contemplate either place or dimensions as definitely fixed, but to be constructed "in accordance with such plans and specifications as *may be fixed* by proper authority acting for the United States."

August 23, 1869, the contractors were notified that the position of the abutment and first pier on the Iowa side were determined and marked, and that they could proceed to their construction.

September 13, 1869, the contractors notified the government agent in charge that they were ready to have the United States proceed to construct the coffer-dams and pump out the water, so that the piers might be put into the river. The next day they were told that the government was not to do this, but that it devolved upon them under their contract. On the 15th, protesting against this construction, they gave notice that they should put in the dams and pump out the water, and did so. The main questions in this cause are, whether or not the contract, as executed, required this work of them; and, if so, whether, in accordance with the prin-

ciples of equitable jurisprudence, it ought to be so reformed as to relieve them of this burden and cast it upon the United States, on the ground that such was the original understanding.

In an original petition, under the ordinary jurisdiction of the Court of Claims, filed December 14, 1870 (Record, 1 to 5), the claimants sought compensation for seven other items besides the one now in controversy (*ib.*, 4), at the same time claiming the round sum of $75,000 on account of this item, numbered as the second in the enumeration of that petition. (*Ib.*) They recovered all to which the Court of Claims thought them entitled upon all their claims (upon any theory of law or equity), except the second and third, *i. e.*, for building coffer-dams, and by reason of the reduction of the size of the piers. (Record, 328, 329.)

The court held, upon this petition, that the contract excluded the consideration of prior negotiations; that, by its terms, the claimants were bound to build the coffer-dams, and to make the piers according to specifications to be thereafter furnished. The claimants acquiesced in that judgment, prosecuting no appeal. The opinions of that court will be found in 8 Ct. of Clms., 505 to 513.

In the course of a concurring opinion, Nott, J., observed: "It is in this connection worthy of note, that *this court is without equitable power to reform a contract* on the one hand, and on the other is required to apply the rigid rule of the common law, which admits of no explanation of the terms of a contract, when there is no latent ambiguity therein. In *most countries under the common-law system of jurisprudence* [how many *countries*

this "most" includes is not quite clear] there are both courts of law and courts of equity, and the party who has *unwittingly* entered into a contract, *contrary to his real intent*, may come into a court of equity for relief. It is for this reason, and not from any presumed sacredness of written contracts, that the courts of the common law have been so inexorable in confining parties to the terms of their contracts, for, having another tribunal in which they might procure relief, they decline to go there." (8 Ct. of Clms., 512, bottom, which see for the continuance of this train of reasoning.) Drake, C. J., dissented from the judgment rendered. (*Id.*, 513.)

Probably taking the hint to do so from the language above quoted, the claimant procured from Congress the act printed at the beginning of this argument, referring their claim for labor and materials to the Court of Claims, with equitable jurisdiction.

Ostensibly under that statute the appellants filed their present bill in equity (Record, 331 to 336) August 30, 1876, so framed as to include (by recital) their former petition, and all items claimed therein, less the $42,306.49 paid upon their judgment, and also "for *damages* and for work and materials" because they were not allowed to build certain walls and crib-work connected with the pivot-pier and with the Iowa abutment, "all of which was part of the plaintiffs' work under the contract"; whereby the United States "unjustly and unlawfully deprived the plaintiffs of large *profits*, which they, otherwise, would have made." (Record, 344, bottom.) They also claimed *interest*. (*Id.*, 336, top.) The bill concludes with a prayer to "the court to reform said contract, if the same be necessary, so as to make the same conform

to the intention of the parties, and to be in consonance with justice and equity; and for such other and further or general relief as in justice and right they may be entitled to have." (*Ib.*)

There was no allegation of any fraud or mistake in the language of the contract, nor any reason given why equitable relief should be administered.

For this reason the United States demurred to the petition. (Record, 337, middle.) The demurrer was sustained. (*Ib.*) For the ruling and opinion on the demurrer, see 12 C. of Cls., 143 to 145. The petition was then amended (Record, 337 to 339) so as to allege that the contract was to carry out the purposes mentioned in the advertisement and proposals hereinbefore recited; that they (the contractors) were by the advertisement asked to bid for either of three things; (1) the complete work; (2) the masonry of the piers and abutments; and (3) the coffer-dams; that they bid for masonry only; that they were invited to call at the arsenal for information as to the size and location of the stone work and the profile of the river-bed; that they did call there for and obtained such information; "but, in consequence of accident and mistake, the said contract was so drawn as to depart from the intention of the parties and from the terms and specifications in said invitation and proposal contained. Instead of requiring the plaintiffs to perform the labor and furnish the materials contemplated by the said invitation and proposal, and in the manner specified therein, the language employed in said contract inequitably required the plaintiffs 'to construct the said piers and abutments in accordance with such plans and specifications as may [might] be fixed by proper authority

acting for the United States.' The plaintiffs did not discover the peculiar language of the said contract *till long after the work had been in progress*, nor did they ever believe that they were bound by said contract to do any more work, and to furnish any more materials, or that they were obliged to perform the work in any other manner than as specified and contemplated in the said invitation and proposal, *until the judgment of this court compelled them to submit to said construction.*" (Record, 338.)

It will be perceived that the *amended* petition did not contain any intimation of mistake as to the inclusion of the coffer-dams, &c., in the work required. Therefore, a *second* amendment was filed March 23, 1878, "in obedience to the suggestions and directions of the court" (Record, 340, 341), in which it was (substantially) alleged that the United States, by its advertisement and acceptance of complainants' bid, agreed to put in the coffer-dams, &c.; but that, by accident and mistake, the contract was so drawn as to impose upon the complainants the burden of building these dams, &c.; and that by like mistake, &c., the contractors were required to build piers of different dimensions and in other places than those indicated to them as the basis of their bid; whereby they were greatly injured, and, therefore, pray to have the contract reformed. (*Id.*, 341, 342.) The United States filed a general denial. (*Id.*, 343.)

Upon the testimony taken under these pleadings the cause comes before this court upon an appeal from the judgment of the Court of Claims dismissing the petition. (*Id.*, 363.)

ARGUMENT.

I.

The appellants' first assignment of error is that "the Court of Claims erred in limiting the claim of the plaintiffs to the items for labor and materials, and excluding all other claims." (Brief, 6.)

This leads us first to consider what are the proper limitations of the cause or matter that is authorized by the special statute aforesaid to be presented to the Court of Claims and then brought here upon appeal, if properly appealable.

At the commencement of the statement preceding this argument (*ante*, p. 2), after giving the language of the law, attention was directed to the fact that this phraseology commits to the court below only Messrs. Harvey & Livesey's claim "for alleged labor *done* and materials *furnished* under their contract." Therefore the claim for loss of conjectural profits that possibly might have been realized from having been permitted to furnish more labor and materials in building larger piers, about the crib-work of the pivot-pier, and the riprap adjoining the Iowa abutment was properly excluded.

If under the contract between the parties the contractors were entitled to build the larger piers, in shoaler or deeper water, to put in the cribs and riprap work, but were not allowed to do so, they were at liberty to claim the damages arising from this breach of their contract in their original suit at law in the Court of Claims. It is not a subject of equitable jurisdiction. They did make it a part of that case that the piers were dimin-

ished in size, claiming $33,600 for "loss of profits" on that account; but that they were at all wronged in not being employed in the construction of the pivot-pier, crib work, or about the riprap wall next the Iowa abutment, seems never to have been suggested until this last petition is filed. Their original claim, filed December 14, 1870, set forth in items, is as follows:

1. Damages from delay	$25,000
2. Putting in coffer-dams and protections, pumping out the water and preparing the beds for the piers and abutments	75,000
3. Loss of profits by reduction of dimensions of piers and abutments	33,600
4. Increased cost of work by having been compelled to do it in cold weather	15,000
5. Constructing 4,400 cubic yards masonry	82,000
6. Loss from idleness of workmen, &c., by defendants' neglect to furnish material and locate piers and abutments	15,000
7. Loss of machinery, vessels, and tools caused by ejectment of claimants from the work	25,000
8. Dressing coping and corners of abutments, and dressing noses of piers under water (not required by contract)	5,000
	229,600

(Record, 4 and 9, middle.)

All the foregoing items have been passed upon, so far as any right arose under the contract according to the construction given it by the court. It is only in case this court thinks the contract as written did not express the will of the parties that any occasion can arise to as-

certain what should be paid for labor and materials under the contract as it should read. If not reformed there is no room for any further adjustment of accounts.

This position is very clearly stated by Nott, J., in giving the opinion sustaining the demurrer. He said:

"The claimants brought their former action in this court upon written contract. By reason of the common-law rule prevailing in this court, all parol evidence tending to vary the terms of the agreement was excluded, and the claimants were held to be concluded by the terms of their contract. A judgment, however, was rendered upon the contract, as construed by the court, in favor of the claimants, though for a much less amount than they deemed themselves entitled to recover. This judgment was not appealed from; the claimants accepted payment thereof, and then applied to Congress for relief. A private act was passed, *Act 14th August*, 1876 (19 Stat. L., p. 490, chap. 279), referring the claim to this court, authorizing it to reform the contract, and to that end conferring equity jurisdiction. Under this act the claimants have brought this their second suit, and to their petition the defendants have demurred.

"The private act under which the suit is brought necessarily measures the relief to which the claimants are entitled, and limits, while it confers, the jurisdictional authority in the exercise of which the court must act. So far as the court's ordinary jurisdiction is concerned, the claimants' grievances are at an end. Their demands at law growing out of the contract were merged in the judgment. The judgment was satisfied. All demands at law were forever extinguished. As to the soundness of the judgment, as to the correctness of the construction which the court gave to the contract, they are con-

clusions in which the claimants in a legal sense acquiesced, and which cannot be inquired into now. If they were erroneous, they might have been corrected by appeal; but, so far as they are now involved, they must stand as unquestionable law. The controversy, whatever it is, must be kept within the bounds of the private act," which he then recites.

"The question of construction which it presents is a very simple one, viz, whether Congress intended to supply a defect of jurisdiction which, in the former action, may have prevented complete justice from being done; or whether they intended to undo all that has been judicially done and give the claimants an opportunity of reopening demands, all of which are in a legal sense extinguished, and some absolutely satisfied.

"Manifestly, in our view of the case, the purpose of the statute was to supply a defect and not to duplicate litigation. The court is to act as a court of equity, and not to act, as it before might have acted, as a court of law. What has been done is to remain fixed, and what before could not be done is to be the sole subject of judicial ascertainment. The court is to proceed simply '*as a court of equity jurisdiction*,' and the accounts which it may adjust and the relief which it may give must be limited to matters not before determined because of its inability to sit as a court of equity." (12 Ct. of Cl., 143–145.)

There is this to be reiterated; that, whether sitting as a court of law or in equity, it only has jurisdiction conferred upon it to hear and adjudicate the claim of Harvey & Livesey "*for alleged labor done and materials furnished under their contract*," whether as written, or reformed.

The United States can only be sued in the forum and

manner, and relative to the matter as to which it has given its consent to enter upon litigation. These elements are jurisdictional. "As the United States are not suable of common right, the party who institutes such a suit must bring his case within the authority of the act of Congress, or the court cannot exercise jurisdiction." (United States *v.* Clarke, 8 Peters, 444; Haycraft *v.* United States, 22 Wall., 98, close of opinion.)

II.

This is the appellants' second assignment of error:

"Second. Said court erred in dismissing the petition of the claimants. It was the duty of the court, instead of refusing to do anything, 'to proceed in the adjustment of the accounts between' the parties and to 'render such judgment as justice and right' might require, as it was directed to do by the said act of Congress." (Brief, 6.)

Among the things that were *res adjudicata* by the former judgment between these parties (8 Ct. of Cl., 501) is the true construction of this contract, taken as it was written. That question was one of law, absolutely essential to be determined by the court, in order to give a legally correct judgment in the case. (Packet Company *v.* Sickles, 5 Wall., 592, and cases cited.)

If the legal effect of the instrument is not changed by reformation of its terms, then the *fact* of the amount due under it was conclusively fixed by the former suit and judgment (*Ib.*), in which case there could be no occasion "to proceed in the adjustment of the accounts"; all that justice and right would require, would be the dismissal of the bill. (Hobson *v.* Com., 1 Duvall, 172, 175, bottom.)

III.

The appellants make no claim in this petition for labor actually done, or materials actually furnished, except those which went into the coffer-dams and their accessions; all the rest is for profits upon what they claim they should have been allowed to supply under their contract.

As to the coffer-dams and the change of piers, they claim they are entitled to have the contract reformed, so as to distinctly relieve them from the burden of building the dams, and to give them the right of erecting the piers in a different place, and of larger size than the contract as executed permitted.

If, in either particular, the written contract secured the right claimed, then (as to that) there was no occasion for the passage of this special statute.

It is now conceded by the complainants that the language of the instrument does not give them either right, and the claim is to rectify it upon the ground of mistake, so that these benefits may be secured to them, in accordance with the alleged original design of the parties.

This leads us to consider the grounds upon which courts of equity reform instruments, and to inquire first, what mistakes authorize such interference; and secondly, whether the contract in question does misstate the intention of the complainants and of the government.

1. Courts of chancery reform instruments only when the language used fails to express the intention of *both* parties, by reason of some mistake of *fact*, which must be established *beyond doubt*. (Preston *v.* Whitcomb, 17 Verm., 188, and numerous cases below cited.)

(*a.*) The mistake must be *mutual.* (Hearne *v.* New Eng. Mut. Mar. Ins. Co., 20 Wall., 490, 491, and cases there cited; Brainerd *v.* Arnold, 27 Conn., 624, bottom; Kennedy *v.* Umbaugh, Wright, 328; Griswold *v.* Smith, 10 Verm., 455; U. S. *v.* Monroe, 5 Mason, 577, bottom; Lyman *v.* Utica Ins. Co., 17 Johns., 373, cited in Nevins *v.* Dunlap, 33 New York, 680, middle; Diman *v.* Providence, Warren & Bristol R. R. Co., 5 R. I., 136, 137.)

In Little & Brown's edition (A. D. 1859) of 4 De Gex & Jones Reports, 250, note 1 to case of Fowler & Fowler, there reported, are cited many English and American cases relative to this matter, the equitable reformation of contracts. They are not here specifically enumerated, because I feel I ought to apologize for giving so many citations upon a matter so well established and understood, rather than to add any more authorities. In the able opinion of the Court of Claims, many cases will be found mentioned and commented upon. (Record, 355.)

(*b.*) It must be a mistake of *fact*, not of law. (Hunt *v.* Rousmanier, 8 Wheaton, 210, 211, and 1 Peters, 9. 15; Bank *v.* Daniel, 12 Peters, 55, 56.)

"One of the most remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good, rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. If, upon the mere ground of ignorance of the law, men were permitted to overhaul or extinguish their most solemn contracts, and *especially those which have been executed by a complete performance*, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the

nature and difficulty of the proper proofs." (1 Story Eq. Jur., § 111; Teed *v.* Bishop, 25 L. J. Exch., 110; Midl'd, &c., Ry. Co. *v.* Johnson, 6 Ho. Lds., 798; Storrs *v.* Barker, 6 Johns. Ch., 169; Hoover *v.* Reilly, 2 Abb. U. S. Ct. Rep., 473–475.)

2. Was there any such mistake of *fact* on the part of the contractors and of the federal agents in this case?

(*a.*) There was no mistake of *fact*. The language was that intended to be used. The difference *now* is as to the proper construction to be put upon it; that is, as to its *legal effect*. This is a question of law. (Martin *v.* Hamlin, 18 Mich., 354, per Christiancy, J.)

The complainants say in their petition that they never believed "they were bound by said contract to do any more work, or to furnish any more materials," &c., "*until the judgment of this court compelled them to submit to* this construction." (Record, 338, below middle.)

(*b.*) The contractors originally understood they were to put in these coffer-dams. They labored under no mistake on this point. Accordingly, in preparing to enter upon the work, they brought the steam-engine and pumps to exhaust the water from these dams: appliances intended and used for no other purpose. (Record, 93, middle; 228, bottom, and 229, top; 232.)

General Rodman, when the bids were opened, said the one of Saulpaugh & Co. was *high* and that of the complainants *very* low; so much so, that "he asked them if they understood what they were bidding on, or understood their business, and whether their bondsmen knew? They answered that they did." Thereupon, understanding they were to build the coffer-dams, a lumber-dealer present asked them to buy material therefor of him and

they promised to give him a call, and did so. (Record, 259, 260.)

(*c.*) General Rodman's intention is accomplished by the construction given to this contract as it reads. He could not consider one bid "high" and the other "*very* low," unless he supposed them to be for the same *entire* work.

Since the appellants refer us (Brief, 8, middle) to "the admirable *argument* of Mr. Justice Nott on the question of inadequacy of price, R., p. 358," I will turn to that page. (Record, 358.)

The computation there found (Record, 359, top), assumed at this point to be correct, shows a difference of 90 cents a yard, or $9,000 in all (estimating the work at 10,000 yards), in favor of complainants against the competing bidders. Mr. Justice Nott says this difference will account for General Rodman's remark that one bid was "high" and the other "*very* low."

In a contract of this nature and extent, it can hardly be said that a difference of $9,000 between the highest and lowest bidders justifies the distinctive epithets of "high" and "very low," while they would be applicable to a difference of $73,000; *i. e.*, between $191,000 and $118,000. (Record, 22, bottom, and 359.)

But at that very time application is made to Harvey & Livesey by one desirous of selling lumber for the coffer-dams to the successful bidders. If the conversation testified to by that witness (Davies, Record, 260, top) had been casual, and his purpose in attending at that time not been *connected with this very subject of the building of the coffer-dams*, it would be entitled to less implicit credit, though it would be quite sufficiently un-

usual a circumstance to impress itself upon any man's memory, to hear the government agent ask a bidder if he and his bondsmen understood what they were about in making a bid.

"The admirable argument of Mr. Justice Nott" commences (Record, 356) with a statement of the action of his own court in a former cause, which I consider incorrect. Speaking of Garfielde's case, he says: "A majority of this court held that the acceptance of that [G.'s] offer did not make a contract." The proposition that a proposal on one side and an acceptance upon the other would ordinarily make a contract was not denied, but affirmed, by the Court of Claims in Garfielde's case. (11 Ct. of Cl., 601, bottom, and 602.) Accordingly, Mr. Justice Hunt commences the opinion of this court with this statement: "The Court of Claims holds that the proposal on the part of Garfielde, and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties." (Garfielde *v.* United States, 93 U. S., 244.)

The point upon which this court differed from the court below was as to validity of the alleged compliance with the statute requiring a previous advertisement as a condition precedent to contracting for a conveyance of the mail.

There was no other contract than Garfielde's proposal and its acceptance; no subsequent, formal contract, drawn up on the basis of these documents, was ever executed.

A formal, signed, *sealed* (Record, 8), and delivered contract, when executed, merges all former *written* proposals, acceptance, qualifications, &c., as much as if they were all verbally communicated.

The advertisement and accepted bid do not at all vary the executed contract, if resorted to for that purpose.

The advertisement commences (Record, 5, bottom) by calling for proposals "for the construction of the piers and abutments of the rail and wagon road bridge." It concludes by asking those who bid for the whole work, *and none others*, to state separately the prices at which they will put in the piers and the coffer-dams, &c. (Record, 6.) *The thing not contemplated was the doing of either directly by the government itself.*

An agreement or offer to build the piers and abutments, without more, implied the doing of all requisite to their completion, without indicating specifically every step in the progress of the work. *If this language had this meaning in the final contract* (as has been conclusively adjudicated), *it must have the same meaning in the preliminary proposals relating to the identical subject-matter.*

The subsequently executed contract, and the acts and declarations of the parties, indicate the intention with which they used the language of the proposals. (Elwes *v.* Elwes, 3 DeGex, F. and J., 667, 681.)

IV.

RÉSUMÉ.

A comparison of what I have written, with the able brief upon which Mr. Simons argued the cause below, just handed to me, convinces me that I should not do justice to the case nor to the government if I did not reproduce a large portion of it here; and I now do so, although it covers ground already traversed, interpolating

a few pertinent citations, especially of the decisions of this court.

"It appears by comparison of the present with the former petition that the second, third, seventh, and eighth items of claim in the first suit are renewed as the first, second, third, and fourth items respectively in this; and the remaining four items in this suit are claims for prospective profits on work and interest not previously specified.

"First. This court has no jurisdiction of any part of the present claim except that included in the first specification of the original petition.

"The action is brought by virtue of a special act of Congress, and the authority of the court, as well as the rights of the claimants, must be determined by the terms of the grant, and that only refers for hearing and adjudication a claim '*for alleged labor done and materials furnished under their contract*' of June 1, 1869.

"This cannot include damages for loss of profits on work *undone*, even though upon their construction of the contract (which the court did not admit) they might have had the right to do it (second item); nor loss on machinery, vessels, and tools, in consequence of their ejectment from the work (third item); nor compensation for work not alleged to be *under the contract* (fourth item); nor for any prospective profits on labor not alleged to have been done or for materials not alleged to have been furnished under the contract (fifth, sixth, seventh items); nor for interest (eighth item).

"It is not to be presumed that Congress intended to set aside the judgment of this court in the prior action and to reverse its findings on the evidence that no dam-

age had been proven from the ejectment; and that the damages from idleness of their tools, machinery, and vessels were no greater than those which were necessarily incident to the termination of the work under the contract; and that the claims for damages for increased cost of work from cold weather and for compensation for alleged extra work were not sustained. No question as to the construction of the terms of the contract was involved in or in any manner affected the determination of these points.

"So, also, it is not to be presumed that Congress intended to open the door for fresh claims for prospective profits and interest before unthought-of.

"What Congress did intend cannot be more clearly and forcibly stated than it has been by this court in the opinion of his honor Judge Nott. (12 C. Cls. R., 144.) It is well summed up in the statement, 'What has been done is to remain fixed, and what before could not be done is to be the sole subject of judicial ascertainment;' provided, we should add, that the subject-matter on which the grant of equitable power is invoked consists of 'alleged labor done and materials furnished under the contract.'

"This rule confines the claim to that included in the first specification, although in the amended petition the matter of the second specification is included, which is a claim for loss of anticipated profits from work that was not done and materials not furnished.

"The claimants virtually concede this result, since no additional evidence has been taken in the present case, but it is rested on that on which the court formerly acted. It would be presumptuous to suppose that under these circumstances a different decision could be ob-

tained from the court on the same evidence, yet the claimants' brief persists in the demand for these unfounded and dismissed claims.

"Second. The grant of jurisdiction to proceed in the adjustment of the accounts between said claimants and the United States as a court of equity is ineffective.

"The claimants have not invoked it; neither in the pleadings nor in the evidence is there any reference to unadjusted accounts between the parties respecting the subject-matter in controversy. The only equitable relief sought is reformation of the contract.

"Third. The court is invested with discretionary authority to reform the contract if a proper case therefor is made out according to the rules and principles of equity jurisprudence, which has not been done.

"1. The petition seems to present a case of mistake of law, and one for which equity will not relieve.

"It will not be questioned that, as a rule, ignorance of the law is of no more avail for attack or defense in equity than at law, and apparent exceptions thereto are referable to other principles. (Story's Eq. Jur., §§ 111, 116, 137, 138.)

"The petition avers that the contract intended to be entered into between the parties is shown by certain terms of an advertisement by defendants for proposals for construction of bridge-piers, &c., and by their proposal in response which was accepted; but that the contract actually executed in consequence of accident and mistake was so drawn as by a certain quoted clause contained therein to depart from the terms and specifications of the said advertisement and proposal. The peculiar language of this clause they say was not discovered

by them until long after the work had been in progress, '*nor did they ever believe that they were bound by said contract to do any more work, or furnish any more materials, or that they were obliged to perform the work in any other manner, than as specified and contemplated in the said invitation and proposal, until the judgment of this court compelled them to submit to said construction.*'

"The clause quoted seems to be a direct averment that they never understood nor believed the said clause of the contract was there by accident or mistake; nor that it did not correctly represent the alleged real contract until after '*the judgment of this court compelled them to submit to said construction;*' and the inference is plain that they have now averred it to be there by accident and mistake, only because the court by construction of its legal effect has compelled them so to do. Can there be a plainer declaration (and it is repeated in their brief) of mistake of law on the part either of themselves or of the court?

"There is neither allegation nor proof of fraud, surprise, misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or of any other circumstance that by admixture with mistake of law has led in exceptional cases to reformation of deeds or other instruments. (Hoover *v.* Reilly, 2 Abbott's U. S. Rep., 471.)

"2. But even assuming that the case rests on averments of a mistake of fact, it has not been established 'according to the rules and principles of equity jurisprudence.'

"It is a fundamental principle of equity that relief by reformation of an agreement for mistake of fact will not be given unless it be proven that the mistake was mu-

tual, and the proof must be given by claimants by the clearest and most exact and satisfactory evidence.

"In Hearne *v.* Marine Insurance Company (20 Wall., 490), the Supreme Court sum up the law on this point in a few lines:

"'Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred. The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified.' Andrews *v.* Essex Fire, &c., Company (3 Mason, 10). See also Nevins *v.* Dunlap (33 N. Y., 676); Sells *v.* Sells (1 Drury & Smales, 42); Sawyer *v.* Hovey (3 Allen, 331); Shay *v.* Pettis (35 Ill., 362); White & Tudor L. C., vol. 2, pt. 1, p. 980.

"The only evidence referred to in claimants' brief to sustain the burden resting on them is that contained in the advertisement (12), proposals (6), original estimates (20, 21), of Rodman; the depositions of their witnesses, Robeson, Warner, and Jones (150, 167, 183, middle), as to what, in their opinion, is the proper construction of the language of the contract (which we suppose

has been settled by this court), and as to the reasonableness of the contract-prices for the masonry alone; and some statements of defendant's witnesses, Stickney and Davies (231, 259).

"The advertisement has nothing ambiguous or misleading about it. It calls for proposals for the construction of certain piers and abutments, and states that the stone, cement, and sand required will be furnished by the United States. The plain implication is that everything else is to be done by the contractor, but any possible doubt as to this is removed by the form of bids prescribed. The first form it is impossible to mistake as calling for a single bid for the entire construction, except as to the materials agreed to be furnished. The second form is clearly required as additional to the first, and is also a bid for the complete work, though required to be divided into two branches. The claimants, we submit, therefore, have in their amended petition misstated the nature of this document in representing it as requesting a triple statement from bidders, and this is of importance, as will be seen in connection with the claimants' proposal.

"The bids, it will be noticed also, were to be indorsed 'Proposals for bridge masonry,' and the bid in the first instance was to state the price for the complete work, including coffer-dams and protections on the basis of the cubic yard of solid masonry in the piers and abutments.

"On this invitation the claimants send in but one bid, as follows (Rec. 6, bottom): 'We propose to build the masonry of piers and abutments of the Rock Island Bridge as per annexed advertisement:

'Small piers and abutments per yard $11
'Draw-pier..... 13

"Could the defendants, who had never invited proposals for anything but the complete work, have construed this otherwise than as a response to their requirement in the first form of bid, and were they not perfectly right in assuming that the proposal was intended to conform thereto, as it did not and could not conform to the second requirement? The claimants say they meant to propose for the masonry only. Then why did they not say so? For, as has been shown, to put in a single bid for a price per square yard of 'masonry' was the form required for a single bid for the complete work.

"So far, at least, there is nothing to show that the defendants' agents had or could be expected to have the understanding of the proposal for which the claimants contend; but they refer to what defendants' witness, Davies, testifies took place when the bids were opened (Rec., 260). He states who were present besides General Rodman and the claimants, and that there was one other bid than theirs:

"'Q. Please state, as nearly as you can, what conversation took place between General Rodman, representing the government, and the said Harvey & Livesey, claimants herein.—A. After reading the bids, General Rodman remarked something to this effect: That the bid of Reynolds, Saulpaugh & Co. was high, and that their bid, referring to the claimants', was very low, and he asked them if they understood what they were bidding on or understood their business, and whether their bondsmen knew. They answered that they did.

"'Q. Please state what occurred then and there with reference to the erection of the coffer-dams required in the construction of said bridge.—A. From the conversation held there, I got the impression that the claimants

were to build and furnish the material for coffer-dams, and upon their leaving the room I followed them out upon the walk in front of the office, and requested Mr. Harvey that, when he got ready to buy his lumber for coffer-dams, to give us a call. He said that he would.'

"Just how this testimony tends to support the claimants' case is not apparent to us. If it shows anything, it is that their attention was called to the nature of their bid before they entered into the contract which they ask to have reformed, and that their liability under it to build the coffer-dams was considered and well understood; and this view is enforced by other facts and circumstances, as will be seen. It was introduced, no doubt, to get some benefit from General Rodman's remark that the claimants' bid was very low, and this is followed by introducing Rodman's estimate (20), Stickney's statement (235) as to the relative difficulty and expense of constructing the coffer-dams as compared with the masonry, and by asking Robeson, Warner, and Jones whether the bid in question was more than a fair price for the masonry alone, and aiming generally to show that the price was much below the worth of the complete work.

"The bearing of all this, if it has any, is to show that when the bids were opened General Rodman must have known from the inadequacy of the price that the bid was not intended for the complete work, but how far it falls short of the clear, full, and satisfactory proof which the law requires must be already apparent. Such as it is, however, it is all that the claimants have to offer.

"The. defendants deny that the preliminary agreement was any other than is expressed by the written contract as construed by the court. General Rodman died before the trial, but they have his statement on

the subject as hereinafter set forth, and the record contains considerable evidence which bears directly against the claimants in the matter in dispute. Thus, Joseph Waters, called for claimants to prove the contract as a subscribing witness, testifies that he was clerk to General Rodman, and prepared or engrossed the contract: 'I wrote a rough copy of the contract, and it was given to Harvey & Livesey for their examination and approval; they returned it as satisfactory, and I at once made out the five copies of the contract.'

"It should be observed in this connection that in the contract which was so examined and approved by them before execution, the clause in controversy immediately follows the 'witnesseth,' and is a short, direct, and clear statement of the essence of the claimants' undertaking, the terms of which, from the nature of the case, could not have escaped their attention. By it they agreed 'to construct the piers and abutments' for the bridge, the United States to furnish certain material, 'and nothing more.' With their alleged understanding of the agreement, it is impossible to account for their execution of the contract after reading its first lines.

"The following facts and testimony also tend to show, as we contend, not only that the agents of the United States always considered the claimants bound to do the preliminary work, but that the claimants themselves so understood it.

"The contract bears date June 1, 1869. Joseph Livesey, son of one of the claimants, testifies for them that he went to Rock Island to work for them, and began to work June 15 (Record, 174, top); that their work on the Iowa abutment in the river commenced about September 1. 'The first work in the river that I did was

in preparing the bottom for the Iowa abutment. The coffer-dam had been built by others. There was a delay of two weeks after the coffer-dam was built, the men all waiting, not knowing whether to go on or what to do' (Record, 174, lower half). This indicates that the abutment coffer-dam was completed by at least the middle of August. If the time occupied in getting together the apparatus for building coffer-dams, the materials, the construction, pumping out, &c., be considered, it is apparent that the preparations for this work must have been commenced by claimants very soon after the signing of the contract. Stickney says (Rec., 231, bottom) they had brought, previous to his coming there (July 21), a steam engine on a flatboat, with the proper running rigging for pumps, and between that time and September 13 they made a dredging-machine, which they connected with the boat for getting material for the dams, and had also on the ground material, considerable of which had been prepared to put in the dams, and went right on with the work, when their request of the 13th was rejected. See also General Warren's testimony as to their preparations for building the coffer-dams (Rec., 228–9), and Stickney (Rec., 231).

"It is undeniable that the first objection which appears in evidence on the part of claimants to building the coffer-dams is in their letter to General Warren of September 13, 1869 (Rec., 13). They were notified the next day by Major Stickney that it was their duty, under the contract, and on September 15 sent a written protest (Rec., 13, 14, 16, 18). General Warren writes the same day to General Rodman, who made the contract, a letter of inquiry (Rec., 277), and the last paragraph is significant, showing that the claimants had already made all

preparations for putting in the dams. Rodman answers on September 16, as follows (Rec., 278):

"'In reply I have to state that my understanding of the contract at the time it was signed was that Messrs. Harvey & Livesey were to put in the coffer-dams, prepare foundations, and do and furnish everything except the stone, sand, and cement necessary to the completion of the piers and abutments, and I was then, and am now, fully impressed with the belief that they so understood it; and the sentence in the contract closing with the expression "and nothing more" was intended, and so stated at the time, to render the contract entirely explicit and free from all ambiguity.'

"Compare, also, the letter of Edson to Stickney, and note the letter of the claimants of July 28 to the Secretary of War, in which they state that prior to July 22 they had already expended in machinery and necessary implements, consisting of steamboat, flatboats, derrick-boat, derricks, and other machinery, an amount equal to $20,000. In their account of damage they charge for laying up the steamboat 133 days prior to November 11.

"The only indication that claimants, prior to September 13, intimated any doubt as to their understanding of the contract is in Stickney's statement, that a few days before, in conversation, they made some allusion to the effect that the United States ought to pump out the water and prepare the beds for the masonry, and then, or afterward, one of them stated that they thought the government should build the dams; to all which he disagreed. The secret of it all is doubtless disclosed in the testimony of Scott (247, middle).

"'I did have a conversation with Mr. Livesey some time in the spring of 1870, with regard to the coffer-

dams. In this conversation he said their (the claimants') intention was to build these dams, until they found that if they did so they were also obliged to make the excavations and prepare the beds. After they discovered this they concluded to deny the intention of building the coffer-dams. He also said they had no intention when they took the contract of making the excavations or preparing the beds.'

"In view of these facts and all this testimony, can this court find that the claimants have by full, clear, and entirely satisfactory evidence shown that the contract in question was executed under a mutual mistake of fact; that it was well understood by both parties, and so agreed by them, that the defendants and not the claimants should do the preliminary work for setting the masonry of the piers and abutments?

"All those concerned in the matter for defendants have recorded an absolute denial of any such mistake or alleged agreement, and if their word is not to be believed, the claimants should at least be required to show how their conduct was determined by the alleged mistake, and in that connection explain the inconsistency of their acts at the time with their subsequent allegations. If they did not expect to build the dams, how came they to prepare so to do, and why did they wait three months after executing the contract before starting this question of its construction? Equity aids the vigilant and not one who delays the assertion of his claims until it is too late for the other party to withdraw or protect himself. So also it will not assist one whose condition is the result of his own negligence or of the want of such diligence and attention as may be fairly expected from a reasonable person under the circumstances; and it must be apparent that, taking the most favorable view of the

evidence possible for the claimants, there was the grossest negligence on their part at every stage of the transaction. Vorley *v.* Bennett (1 C. B., N. S., 225).

"Again, it is not according to the rules and principles of equity to rectify or interfere with an executed agreement, and this for the reason, among others, that the court cannot restore the parties to their former condition and give the defendants in this case the position and rights they would have had but for the contract. (Grymes *v.* Sanders, 93 U. S., 55; Procter *v.* Thrall, 22 Vt., 268.) If the claimants have lost anything it was by no fault of theirs, and if this court undertakes to interfere with the written agreement and make another, are the losses and injury which defendants have borne to be overlooked? and yet from the nature of the case they are such as after this lapse of time it would be very difficult, if not impossible, to estimate or prove. Hough *v.* Richardson (3 Story, 690); Ferson *v.* Sanger (1 W. & M., 138); Hall *v.* Read (2 Barb. Ch., 500); Diman *v.* The Providence, &c., R. R. Co. (5 R. I., 130).

"Third. There is no sufficient proof of the value of labor performed or materials employed in the construction of dams, &c., in question. The loose estimates and suppositions of those whose testimony is relied on are not the best evidence, even if admissible. The contractors, it is to be presumed, can and should show what they paid out for labor, materials, and other items of expense for the work.

"The petition should be dismissed for want of equity."

EDWIN B. SMITH,
Assistant Attorney-General.

OFFICE SUPREME COURT U. S.
FILED
OCT 8 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

HARVEY, &c.,
v.
THE UNITED STATES. } No. 16.

SUPPLEMENTARY BRIEF FOR THE UNITED STATES.

This action is upon a contract between the plaintiffs in error and The United States.

An action upon the same contract had previously been brought (Record, p. 1), and was ended by a judgment in favor of the plaintiffs (p. 330).

With this recovery the plaintiffs were not satisfied. However, they did not appeal therefrom, but applied to Congress, the application ending in an act passed August 14, 1876, *referring the claim again to the Court of Claims for hearing and adjudication, and to that end conferring jurisdiction upon that court "to proceed in the adjustment of accounts between the claimants and The United States as a court of equity jurisdiction," with power, "if, according to the rules and principles of equity jurisprudence, in its judicial discretion," to "reform said contract and render such judgment as justice and right between the claimants and the said government may require."* (19 Stat., 490.)

Thereupon the present action was brought (p. 331), and after consideration a *judgment* was entered, *finding in favor of the defendants*, and *adjudging* that their petition be dismissed (p. 363).

Upon this showing the additional point which I wish to submit is that the appellants cannot have the *findings* reheard in this court, but only the *judgment*.

The statute of 1876 gave them no rights of appeal. For that they have to rely upon general legislation. (See Vigo's case, 21 Wall., 648.)

The reference made by Congress was to a peculiar tribunal, and, of course, with an advertence to its structure and its special connection with the Supreme Court of the United States. Upon this argument the appellants must rely for any standing whatever in this court.

The only positive change which the statute of 1876 made in the case was to confer *equity jurisdiction* upon the Court of Claims. That jurisdiction, however, was presumably to be exercised in conformity with its own modes of procedure. To apply this principle here it seems evident that no alteration was made in the *rule* that in general the *findings* below are not reviewable in this court.

It is in conformity with this conclusion that the act of 1876 speaks of the conclusion to which the Court of Claims would come as a "judgment," not a "decree." A decree differs from a judgment substantially in containing *declarations of fact* as well as conclusions of law. Congress seems to have understood that a declaration by the Court of Claims that the contract did or did not represent the common intentions of the parties thereto would be a *finding* of fact, and thereupon would follow

such judgment as justice and right may require. The use of the word judgment, then, accords with the presumption which otherwise arises as to the intentions of Congress, viz, that the case was referred to a tribunal whose decision as to the *facts* could not be reviewed.

It is elementary law, I believe, that in the absence of an exercise of the power to *reform* contracts are treated in equity upon the same principles that govern courts of law. Therefore, except as to *reformation*, the judgment in the former case between these parties is *conclusive* of the rights of the claimants.

And so they seem to have thought, for, in declining to *appeal* from that case, they admitted that they had no quarrel with *the law* as there administered. In applying to Congress their object was to have an opportunity for showing that by *mistake* the contract was not contained in a certain formal paper appearing to contain it, but in the negotiations which preceded the drawing of such paper. Now, whether there were such mistake was a *matter of fact.*

In other words, in acquiescing in the former judgment of the court below it appears, *as matter-of-fact law*, that *under the formal contract* the plaintiffs can have no farther claim against the United States; and under the *findings* of the same court, acting under a special jurisdiction, it likewise appears in the present case that there is no *ground of fact* upon which to *reform* that contract.

I submit, therefore, that under the circumstances nothing remains to be done here except to dismiss the appeal.

S. F. PHILLIPS,
Solicitor-General.